SBCivil Writ Petition No.2939/1993

Maheshnarain & Ors.
v.
The Custodian General, Rehabilitation Department,
Government of India & Ors.

Date of Order :: 16th February, 2006

HON'BLE MR.JUSTICE GOVIND MATHUR

Mr. Sudhir Sharma]
Mr. Mahaveer Prasad Pareek] for the petitioners.
Mr. B.L.Tiwari, Dy.Govt.Advocate.

.....

By the instant petition for writ validity and propriety of the authority of Tehsildar Hurda, District Bhilwara to issue notice for auction of land in dispute is questioned.

According to the facts stated in the petition for writ, father of petitioner Shri Onkarlal was put in possession of the land in dispute measuring 9.01 bighas on execution of mortgage deed by one Shri Rahimuddin. Entries too were made in this regard in relevant jamabandis by showing Shri Rahimuddin as mortgagor and Shri Onkarlal as mortgagee. Shri Bholanath being son of Shri Onkarnath was substituted in revenue records as mortgagee after death of Shri Onkarlal. The present petitioners with their brother Laxminarain were entered as mortgagees in revenue records after death of their father Shri Bholanath. Shri Rahimuddin quite prior to it migrated to Pakistan in the year 1947. The land in dispute, therefore, was

declared as evacuee property and as such vested with Custodian Department subject to mortgage rights of mortgagees. The petitioners asserted their possession over the land in dispute since the execution of mortgage deed.

Occasion arose to prefer this petition for writ on issuance of a notice dated 17.6.1993 by Tehsildar Hurda for auction of the land in dispute by treating the same as custodian land. Authority of the notice dated 17.6.1993 is assailed by the petitioners on the count that they are in possession of the land in question being mortgagees and, therefore, without getting the mortgage redeemed, land cannot be put to auction.

Shri Sudhir Sharma, learned counsel for the petitioners has contended that the Custodian Department at the most acquire evacuee rights i.e. the right of redemption of mortgagor Shri Rahimuddin, therefore, the land in question is not available for auction being encumbered by mortgage.

Shri B.L.Tiwari, learned Deputy Government Advocate appearing on behalf of the respondents while defending the notice impugned placed heavy reliance upon the provisions of Section 43(4) of the Rajasthan Tenancy Act, 1955 (hereinafter referred to as “the Act of 1955”), according to that a usufructuary mortgage

of any land made before commencement of the Act of 1955 shall upon the expiry of period mentioned in the mortgage deed or 20 years from the date of execution thereof, whichever period is less, be deemed to have been satisfied in full without any payment whatsoever by the mortgagor and the mortgage debt shall accordingly be deemed to have been extinguished and thereupon the mortgaged land shall be redeemed and possession thereof shall be delivered to the mortgagor free from all encumbrances.

In view of the provisions of Section 43(4) of the Act of 1955, it is urged by learned counsel for the respondents that the land in dispute come out from the encumbrances as the period more than 20 years was already passed from the date of execution of mortgage deed and, therefore, mortgage is deemed to be redeemed.

Heard counsel for the parties.

The contention of the counsel for the petitioners is that the land in dispute was mortgaged by Shri Rahimuddin who migrated to Pakistan at the time of partition of the country, therefore, the Custodian Department may acquire at the most the evacuee rights and, therefore, without getting the redemption of mortgage the respondents are having no right to auction the land in question.

I do not find any force in the argument so made as in view of the provisions of Section 43 of the Act of 1955 the mortgage stood redeemed and the status of the mortgagees, those are the petitioners, if they are having possession over the land in dispute become that of trespassers. The land in dispute is not having any encumbrance and the Tehsildar Hurda is well within its competence to auction the custodian land. In fact it was the responsibility and burden of the petitioners to deliver possession of the land to the respondent State in accordance with the provisions of Section 43 of the Act of 1955. I do not find any illegality in the notice impugned for the reasons discussed above.

It is stated by counsel for the petitioners that even if the petitioners be treated as trespassers, the respondents were required to adhere the procedure provided under Section 91 of the Rajasthan Land Revenue Act, 1956 before dispossessing them from the land in dispute in view of the provisions of Section 183 of the Rajasthan Tenancy Act. According to the petitioners no such procedure was adopted by the respondents and the possession of the land in dispute is still with them.

The respondents in reply to the writ petition disputed possession of the petitioners on the land in dispute. The issue with regard to possession of the

land involved disputed facts which cannot be resolved in present writ petition. The instant writ petition essentially pertains to determination of rights of the petitioners as mortgagees and the issue with regard to their possession over the land is not subject matter of present petition. Beside that, it being a disputed question of facts cannot be decided in the instant petition for writ.

Accordingly, the writ petition is dismissed with no order as to costs.

(GOVIND MATHUR),J.

kkm/ps.